



February 27, 2001

Mr. Ric Gonzalez
Assistant City Attorney
City of Lewisville
P.O. Box 299002
Lewisville, Texas 75029-9002

OR2001-0734

Dear Mr. Gonzalez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 144453.

The City of Lewisville (the "city") received three separate requests for information regarding disciplinary actions and/or dismissal of two named employees of the Lewisville Fire Department (the "department"). You state that some of the responsive information has been released to the requestor. You claim portions of the submitted documents are excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the submitted documents appear to be made expressly public by section 552.022 of the Government Code. Section 552.022 provides, in pertinent part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

Gov't Code § 552.022(a)(1). All of the submitted documents appear to be a part of a completed investigation made by the department. These documents must therefore be released under section 552.022, unless the information is excepted from disclosure under section 552.108 or is expressly made confidential under other law. Section 552.103 Government Code is a discretionary exception under the Public Information Act and does not constitute "other law" for purposes of section 552.022.¹ Therefore, we need not address that exception.

Section 552.108 of the Government Code, the "law enforcement exception," provides in relevant part that "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). A non-law-enforcement agency may withhold information under section 552.108 if the information relates to possible criminal conduct and has been or will be forwarded to an appropriate law enforcement agency for investigation. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 493 (1988). You state as follows:

The records requested . . . detail an individual reporting an event that was both a civil and criminal violation – therefore it relates to a detection, investigation or prosecution of crime. The individual reported the event to a law enforcement officer authorized to investigate such criminal events and the officer has yet to refer the matter to the courts for prosecution[.]

Based on your representations and our review of the information in question, we conclude that you may withhold the portions of the requested information that you have marked under section 552.108(a)(1). *See, e.g.,* Open Records Decision No. 474 (1987), 372 (1983) (where incident involving allegedly criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked any proper custodian of information that relates to an incident); *see also* Open Records Decision No. 586 (1991) (need of another governmental body to withhold requested information may provide compelling reason for non-disclosure under section 552.108). We note, however, that basic information about a crime is generally considered public. Gov't Code § 552.108(c); *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177, 185 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127

¹Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.,* Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding), 549 at 6 (1990). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

(1976). Thus, you must release the types of information that are considered to be basic information.

You next claim that some of the information is protected from disclosure under section 552.101 and common law privacy, which is "other law" for purposes of section 552.022(a)(1). Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," which encompasses the common law right to privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The types of information considered to be intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. The Texas Supreme Court held, however, that even if it is shown that certain information is intimate or embarrassing, the information will not be protected from disclosure under common law privacy if "the requestor can show that, under the particular circumstances of the case, the public has a legitimate interest in the information notwithstanding its private nature." *Id.* For instance, the common law right of privacy does not protect facts about a public employee's misconduct on the job or complaints made about his performance. *See* Open Records Decision Nos. 438 (1986), 219 (1978).

The information at issue here contains a description of verbal and physical abuse of city employees by other employees within the Lewisville Fire Department. Although this information may be embarrassing to those individuals who were involved, we believe that the public has a legitimate interest in the on-the-job misconduct of these public employees. Therefore, we conclude that you may not withhold any of the requested information under section 552.101 in conjunction with the common law right of privacy.

Next, you claim that some of the information is protected from disclosure under the informer's privilege. The informer's privilege, incorporated into the Public Information Act by section 552.101, has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928); *see also Roviario v. United States*, 353 U.S. 53, 59 (1957). The informer's privilege under *Roviario* exists to protect governmental bodies' interests. Therefore, it may be waived by the governmental body. Open Records Decision No. 549 at 6 (1990). Consequently, the informer's privilege under *Roviario* is not "other law" that makes the information confidential under section 552.022. But in the recent case of *In re The City of Georgetown*, 2001 WL 123933, at *8 (Tex. Feb. 15, 2001) (No. 00-0453), the Texas Supreme Court held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence

are 'other law' within the meaning of section 552.022." Rule 508 of the Texas Rules of Evidence provides, in relevant part:

(a) Rule of Privilege. The United States or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(b) Who May Claim. The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished, except the privilege shall not be allowed in criminal cases if the state objects.

The statements at issue here were made to an employee of the fire department; they were not made to "a law enforcement officer or member of a legislative committee or its staff conducting an investigation." Therefore, we do not believe that the identity of the person who furnished the information is protected under the informer's privilege, as stated in Rule 508 of the Texas Rules of Evidence.

Finally, we note that section 552.117(1) of the Government Code may be applicable to some of the submitted information. Section 552.117(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the city must withhold information under section 552.117(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. For those employees who timely elected to keep their personal information confidential, the city must withhold the employees' home addresses and telephone numbers, social security numbers, and any information that reveals whether these employees have family members. We have marked the information that we believe may be protected from disclosure under section 552.117(1).

To summarize, all of the submitted documents appear to be part of a completed investigation under section 552.022(a)(1) of the Government Code. You may, however, withhold the submitted information that you have marked under section 552.108(a)(1). You may not withhold any of the information under section 552.101 in conjunction with common law privacy or the informer's privilege. For those employees who timely elected to keep their personal information confidential under section 552.024, you must redact the home addresses and telephone numbers, social security numbers, and any information that reveals whether those employees have family members. If no election under section 552.024 was made, this information must be released. You must release the remaining information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for

contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Stephen P. Agan
Assistant Attorney General
Open Records Division

SPA/seg

Ref: ID# 144453

Encl. Submitted documents

cc: Ms. Meridith Schrucker
WFAA Channel 8 News
605 Young Street
Dallas, Texas 75202
(w/o enclosures)

Ms. Katherine Morales
Lewisville News
131 West Amin Street
Lewisville, Texas 75067
(w/o enclosures)

Mr. Reese Dunklin
The Dallas Morning News
P.O. Box 655237
Dallas, Texas 75265
(w/o enclosures)